NO. 76-6528

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

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DAVID WAYNE BURKS, Petitioner

-vs-

UNITED STATES OF AMERICA

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

* * * * *

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David Wayne Burks petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, infra) not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1976. On February 8, 1977, the court of appeals denied petitions for rehearing filed by both Mr. Burks and the United States (App. B & C, respectively, infra). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the Constitution prohibits the government from presenting additional evidence to carry its burden on the issue of defendant's sanity, when the government failed to do so at a previous trial at which jeopardy had attached?

2. Whether the discretionary powers of an appellate court pursuant to Title 18 U.S.C. §2106 extend to direct on remand a course of action which is prohibited by the double jeopardy clause of the Fifth Amendment to the Constitution?

3. Whether a defendant's motion for new trial effectively acts as a waiver for constitutional protection afforded by the double jeopardy clause of the Fifth Amendment when a previous motion for judgment of acquittal was erroneously denied?

STATEMENT

The petitioner was tried and convicted of armed bank robbery in the United States District Court for the Middle District of Tennessee and sentenced to twenty years imprisonment under 18 U.S.C. 4208(a)(2). At the close of all the trial testimony, counsel for defendant made an oral motion for a directed verdict of acquittal which was denied by the court. A timely motion for new trial was filed on behalf of the defendant on March 3, 1976, and was denied by the Honorable Judge Gray on March 12, 1976. Notice of appeal to the United States Court of Appeals for the Sixth Circuit was timely filed on behalf of the defendant to invoke the appellate jurisdiction of the Court of Appeals pursuant to Title 28 U.S.C. §1291. The Honorable Judges Weick, Lively and Cecil for the Sixth Circuit presided on the appeal and entered their opinion and judgment on December 30, 1976 (App. A). The entry of judgment by the appellate court, obtained by viewing the evidence presented and proper inferences therefrom in the light most favorable to the

government, was that " . . . the judgment of conviction must be reversed."

The Sixth Circuit judgment contends that, "since Burks made a motion for a new trial this court has discretion in determing the course to direct on remand." The Sixth Circuit concluded that, " . . . the interest of justice will best be served in the present case by remanding to the District Court for a determination of whether a directed verdict of acquittal should be entered or a new trial ordered." As a guide for the district court on remand the appellate court adopted the standards and procedures outlined by the Fifth Circuit in United States v. Bass, 490 F. 2d 846, (5th Cir. 1974) quoting the applicable content of Bass (supra at 852-53).

> "We reverse and remand the case to the District Court where the defendant will be entitled to a directed verdict of acquittal unless the government presents sufficient additional evidence to carry its burden on the issue of defendant's sanity. As we noted earlier, the question of sufficiency of the evidence to make an issue for the jury on the defense of insanity is a question to be decided by the trial judge. * * * If the District Court sitting without the presence of the jury, is satisfied by the government's presentation, it may order a new trial. * * * Even if the government presents additional evidence, the district judge may refuse to order a new trial if he finds from the record that the prosecution had the opportunity fully to develop its case or in fact did so at the first trial."

Throughout the proceedings the United States government in its prosecution of the present case did not voice, indicate, or infer that it was, at any time, unfairly prevented from producing competent evidence to carry its burden of proving sanity once a prima facie defense of insanity has been raised.

REASONS FOR GRANTING THE WRIT

I. The judgment of the Court of Appeals for the Sixth Circuit conflicts with applicable decisions and opinions of this Court concerning the double jeopardy clause of the Fifth Amendment to the Constitution.

The United States Court of Appeals for the Sixth Circuit reversed the conviction in this case because of the insufficiency of evidence

to make a question for the jury and to support the conviction.

The appellate court noted that the government has the burden of proving sanity once a prima facie defense of insanity has been raised, and in its appellate review of the evidence presented and the proper inferences therefrom in the light most favorable to the government they,

> ". . . found no evidence which effectively rebutted the specific testimony of three expert witnesses with unchallenged credentials. Thus the judgment of conviction must be reversed."

Subsequent to the appellate decision that the conviction must be reversed they adopted the standards and procedures outlined by the Fifth Circuit as a guide for the District Court to follow on remand.

> "We reverse and remand the case to the District Court where the defendant will be entitled to a directed verdict of acquittal unless the government presents sufficient evidence to carry its burden on the issue of defendant's sanity." United States v. Bass, 490 F. 2d 846, 852 (5th Cir. 1975).

The condition of this remand even though guised under the authority of Title 28 U.S.C. §2106 allowing the appellate court to,

> ". . . direct the entry of such appropriate judgement, decree or order or require such further proceedings to be had as may be just under the circumstances.",

is conflicting with recent applicable decisions and opinions made by this Court concerning constitutional protection afforded by the double jeopardy clause of the Fifth Amendment to the Constitution.

Mr. Chief Justice Burger, delivering the opinion of this Court in Serfass v. United States, 420 US 377, noted,

> ""The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense . . . the underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual . . . . ""
> --Green v. United States, 355 US 184

In another opinion of this Court expressed by Mr. Justice Marshall in United States v. Wilson, 420 US 332, this Court recognized that when a defendant has been acquitted of an offense, the double jeopardy clause of the Fifth Amendment to the Constitution,

". . . guarantees that the State shall not be permitted to make repeated attempts to convict him. . ."

The appellate court in this case made the determination upon their review that there was insufficient evidence necessary to make a jury question or to support the conviction. Subsequently they reversed the conviction and in their remand relied on a statement that was tantamount to a judgment of acquittal when they ascertained that the appellant will be " . . .entitled to a directed verdict of acquittal . . .", United States v. Bass, supra at 852, but they went further in their directions on remand to stipulate,

". . . unless the government presents sufficient additional evidence to carry its burden on the issue of defendant's sanity." United States v. Bass, supra at 852.

The concurring opinion of Mr. Justice Reed in Bryan v. United States, 338 US 552, suggesting sending the case to the district court to decide whether a judgment of acquittal should be entered or a new trial ordered was obviously a determining factor of the course to direct on remand by the appellate court in the present case since it used Bryan as authority.

The Sixth Circuit Court of Appeals has admitted that,

" Bryan teaches us that in a criminal case, though the government has failed to present a prima facie case, it may have a second chance if the court of appeals determines that that course would 'just under the circumstances.'" --United States v. Smith, 437 F.2d 538, 542 (6th Cir. 1970)

But the Sixth Circuit has also just as readily admitted,

"Disposition is a matter of discretion of which course would better serve the ends of justice, this hinges in our view on whether the government was unfairly prevented from producing competent evidence." --United States v. Smith, supra, at 542.

In 'Smith', supra at 542, there were instances that substantiated that the government was unfairly prevented from producing competent evidence. But in the present case this 'hinge' that the Sixth Circuit spoke of in Smith to allow disposition to better serve the ends of justice, is non-existent. There is nothing in the present case which would imply or infer that the government was unfairly prevented from producing competent evidence or that they were prohibited from having the opportunity to fully develop their case

at the first trial, yet the Sixth Circuit indiscriminately applied their previous standards of Smith to the present case where they are clearly not applicable. By doing so they have extended their discretionary powers pursuant to Title 28 U.S.C. §2106 unconstitutionally, and their direction on remand clearly conflicts with previous decisions by this Court concerning the doctrine against retrials as the core of the double jeopardy clause of the Fifth Amendment to the United States Constitution. Breed v. Jones, 421 US 519; United States v. Jenkins, 420 U.S. 358; United States v. Wilson, 420 U.S. 332 340-343, 95 S. Ct. 1013, 1021-22, 43 L. Ed. 2d 232 (1975); United States v. Jorn, 400 U.S. 470, 479, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971).

II. The judgment of the Sixth Circuit Court of Appeals conflicts with other appellate courts on similar matters, and the uncertain and dissimilar decisions among the appellate courts would call for an exercise of this Court's supervision.

After viewing the evidence and the proper inferences therefrom in the light most favorable to the government, the Sixth Circuit Court of Appeals in the present case determined that there was insufficient evidence to support the conviction and stated,

"Thus, the judgment of conviction must be reversed."

The difficulty of determining what course the appellate courts should direct on remand, following a reversal because of insufficient evidence, was recognized by the Fifth Circuit:

"The only remaining question is whether the appellant is to be retried. Whether, and under what circumstances, a court of appeals should permit an accused to be retried when his conviction has been reversed for lack of evidence to support the verdict is a question of some uncertainty."
--United States v. Musquiz, 445 F. 2d 963, 966 (5th Cir. 1971)

Judge Leventhal for the Court of Appeals of the District of Columbia also recognized the inherent constitutional questions raised by this situation and described in some length the reasoning and actions that are taken by appellate courts when faced with this problem, and described the problems, discrepancies, and inconsistencies, among the appellate courts. United States v. Wiley, 517 F. 2d 1212 (1975).

In the present case the appellate court reasoned that,

> "Since Burks made a motion for a new trial this Court has discretion in determining the course to direct on remand."

The District of Columbia circuit in Wiley, supra has said:

> "A fairness approach formulated by Mr. Justice Harlan in United States v. Tateo, 377 U.S. 463, 465-66, 84 S. Ct. 1587, 1589, 12 L. Ed. 2d 448 (1964) has recently been identified by this Court as "the practical justification for the exception" to the double jeopardy clause in cases involving appellate reversals of criminal convictions. However, the applicability of the Tateo approach is in some doubt by reasons of the Supreme Court rulings prior to Tateo which seem to have focused on a waiver type approach, indicating that the double jeopardy clause prevents retrials in insufficiency cases in general, but permits such retrial where the accused has waived the constitutional guarantee by moving for a new trial. Two circuits have read the admittedly confusing state of the law created by the court's decisions to make the permissibility of retrial depend on whether defendant moved for a new trial. As a matter of jurisprudence, neither the fairness rationale nore the new trial waiver approach appear to provide a sound basis for subject defendants, who were wrongfully denied a judgment of acquittal by the district court, to a new trial."
>
> --United States v. Wiley, 517, F 2d 1212, 1216-17 N. 20-24 (D.C. Cir. 1975)

In the present case the trial judge obviously wrongfully denied the appellant a directed verdict of acquittal by virtue of the appellate courts reversal for insufficiency of evidence.

The appellate court contends that since the appellant made a motion for new trial the discretion to direct on remand is theirs.

Compounding the problem is the fact that the appellant's motion for directed verdict of acquittal was made prior to and distinct from a later motion for new trial.

In this instance the appellant would draw an analogy with a previous opinion by this Court. Green v. United States, 355 U.S. 184, 192, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957). In Green, this Court found that a defendant convicted of a serious crime, "has no meaningful choice" but to appeal his conviction, and that such appeal cannot properly be termed a voluntary relinguishment of the defendant's constitutional protection against double jeopardy.

The present case is analogous with this court's opinion in Green in that the appellant had "no meaningful choice" but to motion for new trial after his motion for directed verdict of acquittal was denied. Any attempt by a defendant to rectify a verdict of conviction that has been wrongly imposed should not be deemed a voluntary relinguishment of constitutional

protection against the double jeopardy clause of the Fifth Amendment to the Constitution.

The District of Columbia Court of Appeals in Wiley continues:

> "In this circuit, that statutory directive (28 U.S.C. §2106) has led us to a number of rulings protecting the accused's interest in an acquittal when the prosecution has failed to present sufficient evidence to go to the jury. The interest is one for the trial judge to vindicate in the first instance under the command of rule 29, Federal Rules of Criminal Procedure. But if the trial judge fails in this assignment, the appellate court will exercise its discretionary authority under section 2106 to provide that protection even if the defendant may have moved in the alternative for a new trial."
>
> --United States v. Wiley, 517 F. 2d 1212, 1218 N. 27, 28 (D.C. Cir. 1975)

It is ironic to note that the Sixth Circuit Appellate Court in this case decided that since the appellant motioned for new trial they had discretion to determine the course to direct on remand, and that one of their case sites for that authority was Wiley, supra. Indeed, the D. C. Circuit in Wiley, supra, proceeded,

> ". . . in view of Wiley's motion for new trial . . ."
> --Wiley at 1218

But Footnote 26 of Wiley shows that,

> "Appellant Wiley did not contend that his second trial violated the double jeopardy clause. We do not consider or decide that constitutional question. . ."

In the present case however, the petitioner Burks does contend that the constitution provisions of the double jeopardy clause of the Fifth Amendment were violated in the Sixth Circuits' directions on remand following a reversal for lack of sufficient evidence.

The government in the present case was not unfairly prevented from establishing a prima facie case by providing competent evidence; the government had the opportunity to fully develop its case at the first trial; the government should not be allowed to present additional evidence for a second trial, when it failed to do so at the first trial when that failure did not stem from any manifest necessity; a motion for new trial should not be viewed as a relinguishment of 'double jeopardy' protection.

Provisions should be established by this Court that the appellate courts can use with certainty and consistency in determining courses to direct on remand from reversal for lack of sufficient evidence.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted and an Order entered directing a judgment of acquittal.

Respectfully submitted,

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APRIL, 1977

I hereby certify that a true copy of the foregoing has been mailed to the Solicitor General, U. S. Department of Justice, Washington, D.C. and to the U. S. Attorney, Federal Courthouse, 8th and Broadway, Nashville, Tennessee this 11th day of April, 1977.

Bart C. Durham, III